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# The Contribution of the Principal Judicial Organ of the United Nations to the Achievement of the Objectives of the Organization

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Any assessment of the achievements and progress of the United Nations during the 25 years which have elapsed since the signing of the Charter —and thus of the Statute of the International Court of Justice which is an integral part of the Charter—at San Francisco on 26 June 1945, should, to be a just one, be attempted to some extent from the standpoint of 1945, that is to say taking into account the objects in view, and the means of achieving them, which were contemplated by the draftsmen of the Charter in that historic year. It is of course also possible to adopt a purely objective, external standpoint, to consider what good the Organization has done in the world; but it is perhaps of more interest, and of greater practical usefulness, to consider whether and to what extent the aims of 1945 have been achieved, and whether they have been achieved by the means envisaged in 1945.

So far as the International Court of Justice is concerned, it is not proposed to evaluate the work of the Court by means of any detailed commentary on the 31 Judgments and 13 Advisory Opinions it has given; for reasons given below, such an exercise would not amount to a complete assessment.

The present anniversary does, however, afford an opportunity for drawing attention to the standards by which the achievements of the International Court of Justice might be measured, and in particular to the expectations formulated in 1945. If a reply can be given to the question, What was the International Court of Justice intended to do, and how was it to do it? it may then be easier for others to judge whether the Court has in fact succeeded.

The Charter itself (Article 92) affords the authoritative description of the Court, taken up again in the Preamble to the Statute: "The International Court of Justice shall be the principal judicial organ of

the United Nations". The terms of the description merit some examination, but the first point of interest is that such a description appears at all in the Charter. The Covenant of the League of Nations also made provision for the establishment of a body which was to be called the "Permanent Court of International Justice", and briefly defined its general sphere of competence; but no attempt was made in the Covenant to go any further, or to indicate the status of the Permanent Court relative to the organs of the League or its relationship with the League itself. Subsequent League instruments showed that relationship to be a very close one; as has been justly stated, the Permanent Court was never a part of, but was closely related to, the League of Nations. The International Court of Justice, on the other hand, was conceived as a "principal organ" of the Organization: its Statute, as already observed, forms an integral part of the Charter.

Secondly, it is not without interest to observe that at an earlier stage in the history of the Organization, in the proposals of 9 October 1944—usually known as the Dumbarton Oaks Proposals—an international court of justice was contemplated as one of the principal organs of the proposed new Organization which was to become the United Nations, and Chapter VII of the Proposals contained the definition "the principal judicial organ of the Organization".

Thus from the very beginning the Court was envisaged, not merely as "World Court"—to use the convenient but inaccurate abbreviation often employed to refer to it—but as an integral part of the Organization. It is legitimate to suppose that the experience of the relationship between the Permanent Court and the League was being drawn upon; that the new Court was to be, by express provision and from the outset, what the Permanent Court had, in the absence of textual definition, in fact become, something organically bound up with the workings of the international organization which had given it birth. Furthermore, the parent organization of the new Court was itself conceived as a more unified and organic structure: as has been pointed out, the Charter lays a stress on the purposes, principles and action of the Organization which is not to be found in the Covenant, so that the whole atmosphere of the Charter is that of the constitution of an organized society rather than that of a simple treaty to co-operate. The mechanism devised and set in motion in 1945 was thus one which relied heavily on the integration of its component parts: and the International Court of Justice was envisaged as a "principal organ", i.e., as one of the most essential of those parts.

To return to the Charter itself, we have noted the significance of the description of the Court as a "principal organ" of the United Nations. The term "judicial" may perhaps be regarded as no more than a means of defining the functions of the Court; but it may be observed in passing that in accordance with general constitutional theory, it also implies the independence of the judicial "arm" of the United Nations

*vis-a-vis* the other principal organs. In any event, in the context of the viewpoint of 1945 discussed above, it becomes clear that for the States then assembled, the judicial function was one for which the Charter of the new Organization had to provide; confirmation of this—if confirmation were needed—is to be found in the emphatic references to the peaceful, and in particular the judicial settlement of disputes, which appear elsewhere in the Charter.

While it had become evident from the experience of the League and the Permanent Court that the ends of peace could not be served in the absence of some judicial body having jurisdiction over disputes between States, and closely linked with the main, political organization, the cataclysm of 1939 had made it only too clear that the mere existence of such a body within the Organization could not of itself suffice to avert the scourge of war. Nevertheless, a recognition of the potential value of a court having the widest possible jurisdiction may be seen in the provision in the Charter that all Members of the United Nations are *ipso facto* parties to the Statute of the Court. Although a somewhat similar provision appeared in the eventual Protocol of Signature of the Statute of the Permanent Court, there was no such provision in the League Covenant itself.

The importance of the Court as an aid to the attainment of the objectives of the United Nations was intended by the Charter to be realized in two specific ways. In the first place, the right and the duty of Member States to settle such disputes as might be susceptible of judicial determination by recourse to the Court (in the absence of agreement to settle by other peaceful means) was to constitute a means of reducing so far as possible international friction and mistrust. Secondly, the advisory jurisdiction of the Court may be recalled: the Court was to be always available to furnish the General Assembly or the Security Council (or other United Nations organs and specialized agencies authorized by the General Assembly) with advice on any legal question, in the form of an advisory opinion. It may fairly be assumed that it was considered undesirable for essentially political bodies to come to unaided decisions on questions of a legal character.

It is tempting to discuss the various Judgments and Advisory Opinions of the Court in order to endeavour to draw up the balance sheet of the degree of success achieved by the Court in the realization of the above-mentioned objectives during the 25 years since 1945; but the result of any such attempt would inevitably be misleading. Basically, the reason for this is that, apart from the obvious fact that the work of the Court cannot usefully be subjected to quantitative analysis, in terms, that is to say, merely of number of decisions handed down, the influence of the Court in the field of peaceful settlement of disputes is not confined to the determination of the individual disputes which are brought before it. On the one hand, the mere existence of the Court, especially as

regards States which have accepted its compulsory jurisdiction, has a pacific effect. The possibility of judicial settlement is likely to operate to discourage the prosecution of claims which, whatever their individual merits, it could prove very difficult, or impossible, to substantiate on a basis of positive international law. On the other hand, when a claim *is* pressed as far as the Court, the legal principles which the Court is called upon to enunciate in order to settle such a claim, concerned for example, with international responsibility *(Corfu Channel, Barcelona Traction* cases), with political asylum *(Asylum, Haya de la Torre)* or with the law of the sea *(Fisheries, North Sea Continental Shelf)*, may tend, thanks to the authority which has come to be attributed to the Court's pronouncements, and despite the absence of any strict doctrine of precedent, to remove from the realms of controversy, in the general international arena, certain issues which could otherwise have remained sources of dispute and friction. Requests for advisory opinions may also afford an opportunity for the enunciation by the Court of a general principle of international law (e.g., in the field of the law of international organizations: *Reparations for Injuries* case).

The question which may perhaps more usefully be asked is whether the United Nations machinery of which the Court was designed as an integral part has in fact been operating in the way intended by its designers. If we permit ourselves to take note just in passing of a quantitative observation, the number of Judgments and Advisory Opinions which the Court has been called upon to give in 25 years has been markedly less than the number given by the Permanent Court during the life of that body, which effectively extended over only 18 years. The Court was, as we have seen, designed as a wheel in the mechanism of the United Nations; has there been any tendency to make of it the fifth wheel of the coach?

In a sense, the latter question is not capable of a satisfactory reply. One might point to known disputes between States, which have appeared to be eminently suited to judicial settlement, but which the parties have not chosen to bring before the Court. In the nature of things one cannot know all the reasons why this has been so—reasons which, considered within the framework of the United Nations Charter and its concern for the settlement of disputes by appropriate peaceful means, will frequently have been proper and compelling. On the other hand, not all disputes between States come to the ears even of the citizens of the States concerned; who can say what legal and justiciable disputes may have been disposed of by other, possibly less satisfactory, means, or may still remain unsettled at this moment?

The question is not, however, to be treated for this reason as meaningless. To say that the parties to the Charter foresaw that the International Court of Justice should be the means of judicial settlement of such disputes as were appropriate to this form of peaceful settlement is to say that the parties to the Charter envisaged that the Member States of

the Organization would accept the jurisdiction of the International Court over such disputes. The degree to which States have submitted existing disputes to the Court may not be accurately measurable; but the extent to which they have accepted its jurisdiction *in principle* over legal disputes, or certain classes of legal disputes, is a matter of record.

It should be remembered that when the Charter and the Court's Statute were in preparation, there was, if anything, a majority in favour of a system of truly compulsory jurisdiction for the Court. However, since it seemed clear that such a system would not command complete support, it was decided, in order to achieve agreement, to adopt the system of the "optional clause" contained in Article 36 of the Statute, which had existed for the Permanent Court also, whereby States may deposit declarations recognizing the Court's jurisdiction as compulsory over specified classes of legal disputes.

It might have been expected, in view of the majority in favour of the compulsory jurisdiction of the Court, that the opportunity afforded by Article 36 of the Statute to provide for a considerable measure of compulsory jurisdiction, would have been taken up by most Member States of the United Nations. Nor was this expectation disappointed during the early years of the Organization: at the end of 1950, for example, the United Nations had 60 Member States, of which 34 had filed a declaration of acceptance of compulsory jurisdiction under Article 36—a slim majority, but a majority! (36 declarations had in fact been filed, the other two being those of Switzerland and Liechtenstein, non-Members of the Organization.)

The trend of later years, however, has been less encouraging. By 1960, the number of Member States of the United Nations had increased to 99, but only 37 States (about 38 per cent) had filed declarations under Article 36. Ten years later still, the figures for this anniversary year show a further slight decline: of the 126 Member States, 44 (just under 36 per cent) have accepted the compulsory jurisdiction of the Court. In other words, and this is the point which it is worth stressing, as the composition of the United Nations has become wider, the idea of compulsory judicial settlement, which was favoured by so many of the States gathered at San Francisco in 1945, has also found increased acceptance, but at a markedly slower rate. The system of *compulsory* judicial settlement was of course not built in as an integral part of the United Nations peace-keeping machine; but it is to be feared that widespread hesitation in the acceptance of that system may betray a certain reserve with regard to the general principle of judicial settlement of disputes, which, as we have seen, was built into the United Nations system.

Another discouraging tendency, the seeds of which were sown in 1946, is that of depositing declarations of acceptance of the Court's compulsory jurisdiction subject to reservations which, in effect, enable the State concerned to choose whether or not the "compulsory" jurisdiction will in fact be accepted as compulsory. Reservations of this kind

have been before the Court on more than one occasion, and have been the subject of severe criticism. Nevertheless, although in recent years there has been some improvement in this respect, there are still deposited with the Secretary-General, and not withdrawn, declarations of this kind which, as recognitions of jurisdiction, are no more than the shadow without the substance.

There is perhaps nothing to be gained by attempting to attribute causes to this attitude towards compulsory jurisdiction, although it may be observed that it is to some extent connected with the question of the significance in this field of State sovereignty—as to which there are at least two opposed schools of thought underlying the practice of the Governments of the various Member States. Nevertheless, a digression which can certainly be justified is an attempt to clear up one or two misunderstandings which underlie objections to the practical value, as distinct from the desirability in theory, of international judicial settlement.

For example, it is sometimes suggested that international proceedings take an unconscionable time; and it is not difficult to quote examples of cases brought before the International Court of Justice which have in fact lasted for several years. A closer examination of the proceedings will, however, disclose that the time spent by the parties in waiting on the Court has been, in proportion, remarkably little. If the parties feel they need, and are willing to concede each other, considerable periods of time for the preparation of their pleadings and arguments, it is not for the Court to insist on a more rapid procedure. But nor can any criticism be addressed to the judicial process of the Court for what are evidently delays intimately related to the nature of the dispute itself; most cases which reach the Court involve a variety of complex issues, a heavy documentation, and a considerable history. It is therefore legitimate to suppose that a dispute which takes several years to settle through judicial proceedings would have taken a comparable time to settle in any other way, and that if speedier methods were used, the result might not be even as satisfactory.

Another objection which has been heard to the bringing of a dispute before the International Court of Justice is that of the expense involved. Insofar as this objection is one directed to any sort of arbitral or judicial process at all, it rests on the implied premise that the cost to the States concerned of an unsettled dispute—assuming it to be impossible or undesirable, possibly for the reason just mentioned, to attempt to settle it by less formal means—is likely to be substantially less than the cost of proceedings. The difficulty of establishing this premise is obvious. Should it be a question, however, of choice between the International Court and an arbitral tribunal, Member States of the United Nations should need no reminding that as litigants before the Court they are free from some of the most substantial costs of an arbitration, namely, the arbitrators' fees and the expenses of premises and a secre-

tariat, since the expenses of the Court are borne by the United Nations as a whole.

It is of course still necessary to brief and pay Agents and Counsel before the Court, as would be necessary also before an arbitral tribunal. Here however a wrong impression may have been given by the occasions on which well-known internationalists of high repute have been briefed to appear before the Court. It is worth pointing out that while the contribution of those jurists, not only to the efficient presentation of the case of the State instructing them, but also to the clarification and development of international law in general, is inestimable, not infrequently cases have been conducted, to the entire satisfaction of all concerned, by the legal advisers of the Foreign Office of the State concerned, sometimes with the assistance of members of the national bar of that State. So far as the Court's procedure is concerned, the procedural rules, set out in the Statute and Rules of Court, are very flexible and are the subject of detailed comment in standard works on the Court. The Court is in fact now engaged on a revision of its Rules, and it is hoped that the new Rules will make it still easier for those unfamiliar with the procedure to find their way.

It remains to be considered whether the faculty to request advisory opinions is being made use of as was originally assumed would be the case. It may be recalled that when the League of Nations Covenant made provision for the proposed Permanent Court of International Justice to have advisory jurisdiction, the concept was so novel that no provisions were included in the 1922 Statute of the Permanent Court to give effect to it. Nevertheless, the advisory function proved in practice to be no less important than the judicial function; the Permanent Court gave 5 Advisory Opinions before it had to give judgment in a contentious case, and in the course of its existence it gave 27 Opinions, on the average three every two years.

When the Statute of the present Court was designed after the War, the provisions for the advisory jurisdiction which had been added to the Permanent Court's Statute in 1929 were adopted, and in the Charter, the right to request an Opinion was conferred, not merely on the Security Council and the General Assembly, following the precedent of the League of Nations, but also on any other United Nations organ or specialized agency which might at any time be so authorized by the General Assembly. It was hoped that the new Court would be able to continue the excellent work done by the Permanent Court in this field of its activity.

It is unfortunately impossible after 25 years to say that this expectation has been completely fulfilled. In approximately the same period of time, the present Court has only been called upon to give 13 Advisory Opinions, against the Permanent Court's 27, and this despite the widening of the class of applicants for Opinions just referred to. None of these has been requested by the Security Council, and only two by the specialized agencies. While it may be possible to discern a certain reaction in

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